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March 27, 2000

NEBRASKA STATE LEGISLATIVE BOARD

Docket Clerk
Attn: Docket No. OST -99 - 6578
Department of Transportation
400 7th Street, SW. Room PL 401
Washington, DC.

20590

Re: United Transportation Union Comments on No. OST - 99 - 6578 - 97

Dear Sir or Madam:

The United Transportation Union (UTU) appreciates the opportunity to comment on the aforementioned docket. We were accorded timely notification, invited to provide brief remarks at the open meetings, and given ample time to forward written comments on this same docket.

Certainly, mandated drug and alcohol testing, with the publishing of the initial rule in November 21, 1988, has had a significant and positive impact on safety in the workplace. Those initial mandated testing processes have become acceptable, for the most part, by employers, their employees, and some third parties. However, previously unforeseen challenges demand needed changes in the "rule". Obviously, the Department of Transportation, with this proposed "rewrite of the rule", is responsibly answering that call for change.

UTU includes with this letter, many, many, pages of overview material, for reference purposes. We are summarizing many of our recommended "technical changes," in exhibits 1 and 2. Exhibit 3 is being provided for reference purposes, with exhibits 4 and 5 being reserved for future amendments should our contractual bio-chemists complete their studies, on adulterants, prior to the deadline for comments on this most important rule.

Thank you again for according us the opportunity to participate in this rulemaking. We are hopeful you concur with, and include our recommended changes into the final rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Ray Lineweber".

Ray Lineweber

attachments

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DOCKETING



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1

**Procedures for Transportation Workplace Drug and Alcohol
Testing Programs; Proposed Rules**

49 CFR Part 40

**Federal Register December 9, 1999
Volume 64, Number 236**

AN OVERVIEW OF PREAMBLE LANGUAGE

**BY
Ray Lineweber**

UNITED TRANSPORTATION UNION

March 27, 2000

Interpretations/Exemptions

This rule, if adopted, as proposed, specifically spells out the sources and dates of authoritative guidance of the rule. Guidance would come from the Office of the Secretary (OST), or the Office of Drug and Alcohol Policy and Compliance (ODAPC).

Since this proposal is intended to lead to a revised regulation, all previous guidance and interpretations are invalid, upon the effective date of the new rule.

Anyone desiring an exemption, under any part of the new rule must use the standards and procedures set forth in 49 CFR Part 5, OST's rulemaking procedures.

This draft clearly spells out that regulated employers and their service agents must sign a contract to comply with the new Part 40 rule.

UTU appreciates the clarificational intent in this section.

Prohibition of Additional Testing

UTU opposes this in the current form, see explanation below.
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Although there are some significant gains in the new rule, relative to integrity of the testing process, a clear “due process” structure is missing. With some certainty, DOT attempts to address the issue, but they do not go far enough. Language which is currently found in 49 CFR Part 40.29, (n) (5), is missing. Currently, employees have literally been deemed guilty by the employer, based on information they (employers) receive from the Medical Review Officer (MRO), without the employees having a “safe guard”, which in some cases has been their own test, to fall back on to prove that employees innocence.

Perhaps, an employee would not need their own test if the following provisions were adopted in the new rule:

- An employer shall not conduct drug and alcohol testing in any other manner than which this rule prescribes.
- An employee shall not be disciplined, in any way, if any provisions of this rule are not met during the employees collection, analysis, or evaluation process.

Prohibition of Additional Testing, continued

- **Written requirements that any person,(collector, lab technician, MRO, or otherwise), who has information relevant to an employees sample collection, analysis, and subsequent opinion relating to the results of that analysis, shall, if called upon, be present, to testify, at any disciplinary proceeding, without expense to the employee.**
- **All documents relating to such testing, collection, analysis, and determined result shall be accorded such employee, or his/her representative at least five, (5), working days prior to any disciplinary hearing and allowed into evidence, if requested, at such hearing.**
- **Any errors incurred during the collection, analysis, and MRO review of any such test shall negate such test and another sample be promptly collected.**

Collector Training

This proposal relates to the Breath Alcohol Technicians (BATs) training and seeks comment from the public as to whether or not the same training provisions, in urine collection terminology be adopted into the new rule.

UTU agrees that the BATs, with proper training, are most professional and we have had few problems in the field with those Technicians, When there has been a clear deficiency during the breath collection process, the tests have been cancelled.

There is some concern about the cost factor in this segment. Of greatest importance, however, is not an economical, perhaps slipshod collection process, but one of due process, appropriately addressing the employees well being and their reputation. **We should never cloak collection and economics, without clear consideration of the employee rights.**

UTU recommends clear language be placed in this rule requiring the collectors to be certified.

Drug Testing Forms and Materials

DOT proposes that no one can use a DOT drug testing form for a non-DOT test or vice-versa. There is also comment about the type of foreign-language to be used on some of the forms.

UTU supports the continuation of the DOT logic here. The prevention of using DOT forms for anything other than a DOT test, prevents uninformed employers from using such material for company agendas which are not sound in application and principle.

UTU also suggests that DOT require the employer to provide confirmation to their service agent, the language the employee speaks when such random/reasonable suspicion/post accident testing is to be conducted.

Electronic Records and Signatures

DOT does not propose any new changes in this area.

UTU generally supports the use of such measures, as long as there are safeguards protecting the confidentiality of the employee, and a mechanism which highlights the identity of the person who enters such file.

Collection Process

DOT honorably attempts to make certain that **adulterants** are not used at anytime. They also make clear that unconscious employees are not subject to urine collection, a somewhat “watered down” version of the current “**an** inured employee should not be denied medical treatment, in order to conduct drug and alcohol testing.” The language relating to a “shy bladder” or “refusal” is insufficient and lacks clarity.

UTU is opposed to having collectors inspect boots for adulterants, as there are so many other areas on outer clothing to conceal adulterants. Clear and structured direction needs be written relative to the “shy bladder” collection process, similar to the existing rule. Finally, there must be some inclusion here relating to new science.

Directly Observed and Monitored Collections

DOT desires to clarify in the rule measures which should be taken in event an employee's sample appears to be "dilute".

UTU supports witnessed collections, by same collectors of the same sex, of course, in event a sample appears to be dilute. Currently, the laboratory analytical permissiveness, and lack of clear directions to the MRO have caused many employees, who may have a legitimate normal body function dilute to be accused of substitution. **A WITNESSED COLLECTION CAN EXONERATE AN EMPLOYEE FROM BEING ACUSED OF WRONGDOING. HOWEVER, UTU DOES NOT RECOMMEND THAT ALL COLLECTIONS BE WITNESSED, JUST THOSE WHERE WRONGDOING IS SUSPECTED.**

Laboratories

DOT desires to eliminate some of the duplicative guidelines in this rule which is already covered under Health and Human Services guidelines. This rule would also require laboratories to test for nitrites, **PH**, **creatinine** and in certain circumstances, specific gravity.

DOT seeks comment on the time a laboratory should be mandated to keep records relative to negative and positive test results, and subsequent prohibitive practices.

UTU, being consistent in our support for drug testing, supports the need to formalize guidelines to determine if samples have been diluted, substituted, or adulterated, prior to being analyzed for the five illegal drugs. Since **creatinine** is a component of human urine, why not have the detectable level for **creatinine** at 2 or greater, instead of the cutoff of **20** or 5 that some laboratories use? A gravity level between **1.001** and **1.020**, appears to be reasonable? Of course, we must rely on the science for the cutoff levels of **adulterant** components. A provision of reason shall be inserted that would negate a perceived adulterant level, if a scientific study would show otherwise.

Relating to records: Those records for negative test results should only be required to be kept for one year, or less, if a mechanism is acceptable to those who inspect laboratories concur. Those records for positive, or for lack of better terminology "questionable" test results, shall be retained for five years or unless the laboratory is in receipt of a written release by both the employer and employee, that such records are no longer needed.

Laboratory Reports

DOT desires, in this section to be consistent with **HHS**.

UTU agrees with consistency throughout the Drug and Alcohol Testing Programs. We recommend that DOT formalize the “ONE DOT” flagship the Honorable Transportation Secretary Rodney Slater is promoting.

Blind Specimens

UTU has some concerns here, albeit concerns for which we have no data to support. Therefore, UTU will, without seeing, support the position taken by Dr. Robert Willette.

MRO Training and Responsibilities

DOT wisely recognizes the significant role of the **MRO** in this rule. Therefore, clear and required **educational** guidelines **shall** be established. DOT seeks comment on the 14 day period of contact between an **MRO** and employee. DOT also wants to know if it should be permissible for **MRO's** to conduct their functions across state lines.

UTU is pleased with the DOT “inclusive effort” here. Obviously, we must first establish if there is a mechanism which protects the employee from being accused of any wrongdoing (during this 14 day period) if such employee were to be on vacation, or off injured. There should be no contact by the MRO, or employer if such employee is on vacation, under a doctors’ care, or any other legitimate means which would cause the employee to be unavailable.

MRO Reviews of Test Results

DOT here desires to clearly define the role of **MRO** vs: **MRO** Staff. Of course it is important that the duties are formalized and clear. The number of attempts to contact employees is discussed briefly here, as well. Most importantly, however, DOT hints at the “stand down” issue.

UTU concurs with DOT on the issue of clear division between **MRO** and **MRO** Staff. We also desire the attempts to contact the employee be recorded electronically, with the attempted contact number and time locked in. UTU is opposed to any stand down provisions, unless DOT desires to be so bold to require the employee to be paid for lost time while in “stand down status”.

MRO Verification Process

DOT examines much **bio-chemistry** here. DOT also cautions the **MRO**’s from using evidence from unauthorized sources, some of which is well founded.

UTU cautions DOT to not loose sight of the emphasis DOT places on the **MRO** contribution to the process. With that emphasis, equally important is the accountability relative to “**due process**”. UTU concurs that the employer is responsible for making certain the test of the “split” occurs if the employee so requests that. When the **MRO** notifies the employee of his/her right to test the split, that would be a great opportunity for continuity to prevail. DOT could and should require the **MRO** to notify the employee of the availability of a laboratory person to **testify** and the **laboratory** records provisions of this rule.

Adulterated, Substituted, and Dilute Tests

DOT proposes in this rule to mandate “**validity testing**” of urine samples. Their (DOT) policy provides that a person who has adulterated or substituted a specimen be viewed as having refused a test. DOT relates to some of the suggestions by other parties (UTU among others) who have advocated the testing of the “split sample”. There are considerable options and DOT seeks comments on regarding this most important element of the testing process.

UTU supports “**validity testing**”, but is concerned, again, that little emphasis is placed on the basic employees rights during the analytical process. Unless the science is proven, and as other science develops, every proven option, relating to exoneration, shall be accorded the employee. Testing the “split” is one of those.

Employer Actions

DOT opens the record here for comment related to “stand-down”. They are unbiased in their approach, merely pointing out that “some do, some don’t”, when it comes to employer practices relating to the “stand-down” issue.

UTU clearly opposes “stand-down”, and would encourage DOT to prohibit the same in the regulatory text.. for all agencies. This is probably the area where UTU must make DOT aware of the adversity created with the language which currently allows “company policies not inconsistent with the rule”. All too often, drug and alcohol testing is conducted after a derailment wherein the employees clearly did nothing to contribute to the same. Even so, a company officer may instruct the employees to then be tested. After testing the crew, in some situations, the railroad instructs that same crew to complete their duty tour. DOT has but two options to prevent this type of managerial conduct:

1. In the spirit of continuity, place clear instructions in the new rule forbidding the return to the same duty tour if a crew is tested after an incident; or
2. Require the employees to be withheld from service until the test results are returned, with such employees being paid for all lost wages during the period for which they are withheld from service.

UTU also supports the witnessed collection if the employer receives notification from the MRO, or collector, of an apparent substitution or adulteration. That part of the proposed rule requiring an employee be withheld from safety sensitive service when there is a confirmed report from a BAT of a result greater than 0.02 is sound. It would certainly be appropriate to prevent any discipline for a result of 0.039 or less, for any employer,(but withholding from safety sensitive service until the alcohol level drops below 0.02) in this same rule.

Split Specimens

DOT wants to make certain a timely analysis is made of the split, without the quibbling over “who should pay”.

UTU supports split specimen collections for all entities.

“Problem” Drug Tests

DOT desires to clearly spell out the circumstances in which an employee’s actions are considered to be a refusal to test.

UTU supports this, if clear due process mechanisms are in place.

Alcohol Test Administration

DOT proposes to mandate retraining for BATs and STTs who make a mistake resulting in a cancellation of a test. DOT is seeking comment on how well the current rule is working, and desires input on the saliva test.

UTU supports DOT in this effort. We have had but few minor problems with the BATs. When those have occurred, and the record verifies the same, the test, if deemed to be positive, has been cancelled, with no penalty to the employee.

Substance Abuse Professionals

DOT proposes to add training requirements for SAPs, strengthen the waivers of liability, and prevent “shopping” for a favorable SAP evaluation.

UTU supports the DOT position.

Confidentiality and Release of Information

DOT desires to retain the existing confidentiality provisions, and appears to honorably r-e-insert the elimination of that part of the current rule relating to records (40.37).

UTU supports this, and encourages the DOT to take the added and necessary “due process” step requiring relative persons to testify at disciplinary hearings, without expense to the employee who may be accused of any wrongdoing.

Service Agent Roles and Responsibilities

DOT desires to “tighten the net” and disallow practices which are not authorized by DOT rulemaking.

<u>UTU strongly supports this proposal, it would be a great opportunity, for DOT, in writing, to absolve the new regulation of “company policy” testing maneuvers..</u>
--

Public Interest Exclusions (PIEs)

DOT will clearly **define** that employers comply with the testing procedures as set forth in Part 40. This means they (employers) will be responsible for the actions of their service agents.

<u>UTU supports this proposal.</u> Additionally, this would be a good section to place the clear directive relating to what is expected of the service provider when concerns are expressed about a test result or decision not to analyze any sample.
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UTU is pleased that DOT would elect to take measures to make adjustments as necessary to the existing rule. The analysis on a section by section basis, of the proposed rule, are attached.

**Procedures for Transportation Workplace Drug and Alcohol
Testing Programs; Proposed Rules**

49 CFR Part 40

**Federal Register December 9, 1999
Volume 64, Number 236**

**AN OVERVIEW OF SUBPART LANGUAGE
WITH UTU SUGGESTED TECHNICAL AMENDMENTS**

**BY
Ray Lineweber**

UNITED TRANSPORTATION UNION

March 27, 2000

Subpart A -- Administrative Provisions

(FR page 69097)

40.3

The definition of “collector” should have the words **“and certified”** after the word **“trained”**.

40.5

After the word **“regulate”**, strike the period (.) insert a comma (,) and insert the words **“and their employee representatives.”**

Subpart B – Participant Responsibilities

(FR page 69099)

40.15

Add section **“(g) Employers are prohibited from using the same laboratory for “company policy” testing analysis that conducts their DOT analysis.”**

Subpart C – Urine Collection Personnel

(FR page 69099)

40.31

In part (c) , after the word **tested**, strike the comma (,) and insert a period (.) The remaining words in that sentence **“unless no other collector is available and you are permitted to do so under DOT agency regulations”**. , shall be deleted.

40.33

In part (a) after the words **“be a”**, insert **“certified”**, and add such terminology throughout the rule prior to the word **“collector”**. Add the following sentence to this definition: **“Collectors shall be tested for color blindness on an annual basis”**.

**Subpart D – Collection Sites, Forms, Equipment
and Supplies Used in DOT Urine Collections**

(FR page 69100)

40.43

In part **“(d)(2)”**, after the word **“urinated.”**, insert the following sentence. **“If the collector or employee leave the sample unattended, prior to that sample being poured in the proper container(s), and sealed, meeting the chain of custody requirements, such sample is not subject to any analysis.”**

Subpart E – Drug Test Collections

(FR page 69102)

40.61

In **“(b) (2),** after the word **“attention”**, insert **“at any time”**, and strike the words **“(e.g., an inured employee in an emergency medical facility who is required to have a post-accident test)”**.

Subpart F – Drug Testing Laboratories

(FR page 69105)

40.87

Though not definitive, UTU suggests the inclusion of some language in this section which would allow the laboratory, as directed from HHS, to confirm the results of new science, i.e. On- Site Testing methodology.

40.93

In part **(c)**, after the words **“cutoff of”**, strike **“5”** and insert **“2”**. In part **(1)**, change the number **“5”** to **“2”**.

Subpart G – Medical Review Officers (MROs)

(FR page 69109)

40.137

UTU generally supports this language, but some language clarifying the “good” meth, i.e. inhalers must be incorporated.

40.145

In section **(f)**, strike the word **“not”** and after the word **“authorized”**, strike the period **(.)** and insert the language **“DNA (genetic) testing is conducted at the employees expense, if such test determines the test result to be conclusive. If such test exonerates the employee, costs shall be absorbed by the employer. Such “information” relating to DNA, after use, shall be purged and never placed in an employees personal file.”**

Add section **“(g) You must also inform the employee that he/she has a right to the laboratory records, relating to his/her test, and a laboratory representative shall be available to testify at any disciplinary hearing.”**

40.151

In **(1)** after the word **“information.”**, insert **“Request the laboratory to “test the split sample”**.

40.159

The manner in which UTU interprets this proposed language, relating to stand-down, is that an initial positive test result, reported to the MRO, by the laboratory, may result in the employer withholding the employee from performance of “safety sensitive duties”, pending; the MRO review of such reported test result. **The temporary removal from safety sensitive service, of an employee, shall be withheld from other employees and managers.**

Subpart I – Problems in Drug Tests

(FR page 69117)

40.193

Add section “**(5) If the collection is for a random test, and the Hours of Service (49 CFR Part 228) provisions for the employee being tested expire, during the 3 hour period, discontinue the collection. No follow-up is needed?**”

40.201

Insert “**(g) If an employee is not accorded requested laboratory records, and a person to testify at any disciplinary hearing. discipline shall not be assessed?**”

Subpart J – Alcohol Testing Personnel

(FR page 69119)

40.211

In part **(d)**, after the word “**tested**”, strike the **(.)** and insert a **(.)**

Subpart L – Alcohol Screening Tests

(FR page 69121)

40.241

In part **(2)** (ii), after the word “**needs**”, insert the word “**any**”.

Subpart M – Alcohol Confirmation Tests

(FR page 69123)

40.257

Add subpart “**(c) An employer shall not discipline an employee as a result of a BAT reported test result of 0.039 or less. However, DOT mandates the employee shall not perform any safety sensitive service until such employees’ confirmed test result is less than 0.02.”**”

**Subpart O – Return-to-duty Process and Role of
Substance Abuse Professionals (SAPs)**

(FR page 69126)

40.283

Add subpart **“(c) A breath alcohol test of 0.039 or less, alone, is not sufficient to mandate an evaluation of an employee by a SAP, or discipline of any kind.”**

40.293

In subpart **(3)** add the following sentence **“This report to the DER shall identify the employee by means of a computer user identification or payroll number and shall not include the employees’ Social Security Number.”**

40.305

In subpart **(a)** insert **“ The employee shall be reinstated when released to the employer from the SAP.”** Strike all other language in this section.

40.311

In subpart **(a)** add this sentence: **“The employees Social Security Number shall not be used in this report.”** Strike reference to the Social Security Number elsewhere in the proposed rule.

Subpart P – Confidentiality and Release of Information

(FR page 69129)

40.331

Add subpart **“(d) An employer shall make certain the employee is accorded the requested records and a laboratory person to testify who has firsthand knowledge regarding the laboratory operating procedures, and records.”**

Subpart R – Public Interest Exclusions

(FR page 69132)

40.367

In subpart **(a)**, after the words **“initiating official”**, strike the word **“may”** and insert the word **“shall”**.

Delete subpart **(b)** from this part.

**Appendix B to Part 40 – DOT Drug Testing Semi-annual
Laboratory Report**

(FR page 69135)

Add section “5 Total number of laboratory errors during this reporting period.”
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Appendix C to Part 40 – CCF Copies Needed for the MRO Review (FR page 69135)

UTU suggests adding the time on duty language, time of test initiation, and, if necessary, any other information to provide the MRO for discontinuing a random test collection due to Hours of Service expiration.
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**Procedures for Transportation Workplace Drug and Alcohol
Testing Programs; Proposed Rules**

49 CFR Part 40

**Federal Register December 9, 1999
Volume 64, Number 236**

AN OVERVIEW OF TEXT LANGUAGE
(BEGINNING ON PAGE 69097)

BY
Ray Lineweber

UNITED TRANSPORTATION UNION

March 24, 2000

***** For expediency in reviewing the UTU remarks, any section with terminology enclosed as this, includes recommended technical changes by UTU**

Page **69097**

Subpart A-Administrative Provisions

40.1 Whom does this regulation cover?

UTU accepts this language, as umbrella coverage for anybody who conducts Federal Testing under this proposed rule

40.3 What do the terms used in this regulation mean?

*UTU suggests that the definition of “collector” include the words **and certified** to be inserted after the word **trained**.*

Page **69098**

40.5 Who issues authoritative interpretations of this regulation?

*UTU suggests that after the word **regulate**, strike the period (.), insert a **comma (,)** and add the language **and their employee representatives**.*

40.7 How are exemptions granted from this regulation?

UTU supports this terminology, but suggests a time of response, by the respective agency may be inserted, consistent with the waiver provisions for that agency.

Subpart B-Participant Responsibilities

40.11 What are the basic responsibilities of employers under this regulation?

UTU supports this terminology.

40.13 If an employer has employees subject to testing under both DOT and the Nuclear Regulatory Commission (NRC) regulations, what procedures does it follow?

UTU supports this terminology.

40.15 If an employer conducts non-DOT testing, under its own authority, as well as DOT testing, what Federal restrictions apply to the two tests?

<p><i>UTU is concerned about this section. The science is not <u>perfect</u>, and there have been situations wherein the employees sample, collected in a timely manner, at a personal physicians office did in fact prove the employee to be innocent for drugs. <u>If the agency intends the employer cannot use the same laboratory for “company policy testing” that it does for the DOT tests, perhaps that would be acceptable.</u></i></p>

40.17 Can an employer use a service agent to meet DOT drug and alcohol testing requirements?

*UTU does not accept this answer, and suggests that a company should not be able to use a service agent to do both. That is where the confusion comes in today. The language **“this part and”**, in two parts of the sentence in (a) should be stricken. The alternative is to allow an employee to **“provide his/her own sample”**, as you cannot erode the regulation for the employer and allow the employee to remain hostage to “company policies”.*

40.19 May service agents impose requirements on employers that DOT agency regulations do not specifically authorize?

UTU supports this language.

Page **69099** , continued

40.21 Do service agents have to comply with DOT drug and alcohol testing requirements?

UTU supports this language.

Subpart C-Urine Collection Personnel

40.31 Who collects urine specimens for DOT drug testing?

UTU is concerned here the language is not clear. What if a supervisor from an adjacent city, or employer division were to become the collector. This only invites trouble.

Page **69100**

40.33 What requirements must a collector meet?

*UTU suggests the word “**certified**” be inserted in this language after the a in the lead sentence, and after the a in the first sentence of (a). “**All collectors shall be tested annually for color blindness**”.*

40.35 What requirements must organizations employing collectors meet?

*UTU suggests the word “**certified**” be inserted where appropriate to make the language consistent with the intent throughout this rule.*

40.37 Where is other information on the role of collectors found in this regulation?

*UTU suggests the word “**certified**” be inserted where appropriate to make the language consistent with the intent throughout this rule.*

Subpart D-Collection Sites, Forms, Equipment and Supplies Used in DOT Urine Collections

40.41 Where does a urine collection for a DOT drug test take place?

UTU concurs with this language.

40.43 What steps must collection sites take to protect the security and integrity of urine collections?

UTU suggests the following sentence be added to (d) 2 after the word urinated. “If the collector or employee leave the sample unattended, prior to that sample being poured in the proper container(s), and sealed, meeting the chain of custody requirements, such sample is not subject to any analysis.”

40.45 What form is used to document a DOT urine collection?

*UTU accepts this language, but suggests the word “**may**” in section (b) be changed to “shall”, for clarity purposes, which would keep this clear from “company tests”.*

40.47 May employers use the CCF for not-DOT collections or non-Federal forms for DOT collections?

UTU does not really agree with this, as, again, it only invites problems with the collection. The collector should have DOT forms with them at all times. Medical facilities that would meet the collection requirements here, would obviously have forms and respective kits available as well.

40.49 What materials are used to collect urine drug specimens?

UTU supports this language.

40.51 What materials are used to send urine specimens to the laboratory?

UTU supports this language.

Subpart E-Drug Test Collections

40.61 What are the preliminary steps in the collection process?

*In **(b)(2)**, after the word “attention”, insert “**at any time**”, and strike the words “(e.g., an injured employee in an emergency medical facility who is required to have a post-accident test). The logic behind this, is you are making company officials medical personnel, and they will automatically determine the person is not injured **sufficiently** to prevent the collection of urine prior to attaining medical treatment.*

40.63 What steps does the collector take in the collection process before the employee provides a urine specimen?

UTU supports this.

40.65 What does the collector check for when the employee presents a specimen?

UTU supports this language.

40.67 When and how is a directly observed collection conducted?

UTU supports this language.

Page **69103** continued

40.69 When and how is a monitored collection conducted?

UTU supports this language

Page **69104**

40.71 How does the collector process a single specimen collection?

UTU suggests adding language which deems the collection a failure if the collector or donor loose sight of such specimen, or if it is left unattended for any period of time.

40.73 How does the collector process a split specimen collection?

UTU suggests the language as referenced in 40.71 apply here as well.

40.75 How is the collection process completed?

UTU supports this language.

Page **69105**

Subpart F-Drug Testing Laboratories

40.81 What laboratories may be used for DOT drug testing?

UTU supports this language.

40.83 How do laboratories process incoming specimens?

UTU supports this language

Page **69105** continued,

40.85 What drugs do laboratories test for?

UTU supports this language.

40.87 What methods do laboratories use for screening and confirmation tests?

UTU suggests the inclusion of some language which would allow the laboratory, as directed from HHS, to confirm the results of new science, ie. On-site test methodology, if it is determined, by DOT and/or HHS, to be acceptable, obviously, now would be the opportune time to place "language to reflect the science " in the regulation.

Page **69106**

40.91 What additional testing must be done by laboratories on primary samples?

UTU supports this language.

40.89 What are the cutoff concentrations for screening and confirmation tests?

UTU supports this language.

40.93 What methods and criteria do laboratories use for validity testing?

*UTU desires the regulations to be consistent as possible. With reference to the **creatinine** In part (c), cutoff of **5**, should be changed to the number **2**. This is posed in reference to TITLE IO – ENERGY, of CHAPTER I- NUCLEAR REGULATORY COMMISSION, language on page 420 “The last urine specimen provided by the individual (i.e., on a previous occasion) was determined by the laboratory to have a specific gravity of less than 1.003 or a **creatinine** concentration below .2 g/l. UTU realizes that is in follow-up situations, but why would we want to have a variance of 5 or 2 g /l of **creatinine**? Obviously if it is present in the urine, we know it is human urine, do we not? It would be good to change the 5 to 2 throughout the regulation. This same language is currently found in CFR 40.25,(B) (ii).*

40.95 What do laboratories need to report to MROs regarding primary specimen results?

UTU supports this language.

40.97 Through what methods and to whom must a laboratory transmit results?

UTU supports this language.

40.99 How long does the laboratory retain specimens after testing?

UTU generally supports this, as many of the questions, relating to samples as discussed will be within the period. Of course the respective records, in another section needs discussion.

40.101 What relationship may a laboratory have with an MRO?

UTU supports this language.

40.103 What blind specimens must be sent to a laboratory?

UTU supports this language.

40.105 What happens if there is a laboratory error on any test?

UTU supports this language.

40.107 Who may inspect laboratories?

UTU supports this language.

Page **69108** continued,

40.109 What documents must the laboratory keep, and for how long?

UTU supports this language.

40.111 When and how must a laboratory disclose statistical summaries and other information it maintains?

UTU suggests the language that is currently in CFR 40.29 (n) (5) Personnel available to testify at proceedings, be incorporated here. The proposed regulation is silent on this.

Page **69109**

40.113 Where is other information concerning laboratories found in this regulation?

<i>UTU appreciates this cross-reference guidance this part provides.</i>
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Subpart G – Medical Review Officers (MROs)

40.121 Who is qualified to act as an MRO?

UTU supports this language.

40.123 What are the MRO’s responsibilities in the DOT drug testing program?

UTU supports this language.

40.125 What relationship may an MRO have with a laboratory?

UTU supports this language.

40.127 What are the MRO’s functions in reviewing negative test results?

UTU supports this language

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40.129 What are the MRO's functions in reviewing laboratory confirmed positive drug test results?

UTU supports this language.

Alternative 1 for Paragraph (d)

UTU supports this language.

Alternative 2 for Paragraph (d)

UTU supports this language.

40.131 How is the employee notified of the verification process after a confirmed positive test result?

UTU supports this language..

40.133 Under what circumstances may the MRO verify a test as positive without interviewing the employee?

UTU supports this language.

Page **69111**

40.135 What does the MRO tell the employee at the beginning of the verification interview?

UTU supports this language.

Page **69111** continued,

40.137 On what basis does the MRO verify test results involving marijuana, cocaine, amphetamines, and PCP?

UTU generally supports this. However, there must be some language in here relative to the inhalers (which we understand contain an acceptable “meth”. The instructions to the MRO and Laboratories must clearly define the “good vs: bad” here.

40.139 On what basis does the MRO verify test results involving opiates?

UTU supports this language.

Page **69112**

40.141 How does the MRO obtain information for the verification decision?

UTU supports this language.

40.143 What are MROs prohibited from doing as part of the verification process?

*UTU has significant concerns with the inability of the MRO to go the “extra mile” here. What is harmful if the employee is absolutely certain he/she is not guilty of the charge to have the sample “genetically tested”? Of course, the “economic card” is played here. We must ask if this rule is about economics or safety and the due process relating to that? Certainly, if we are considering economics, DOT would be in good standing to incorporate in the rule “employers shall not conduct testing outside these regulations as it is uneconomical to do so. Perhaps employees would accept that. Returning to the “alternative test issue”, the only concerns somebody may have with allowing a genetic test would be if a laboratory was proven wrong, or the sample was indeed somehow mixed **If an employee is determined to prove their innocence, let them do that with genetic testing, at their own expense, if the test concurs with the laboratory finding.***

40.145 How does the MRO notify employees of their right to a test of the split specimen or to a retest of a single specimen?

UTU generally supports this, but would add language relating to the genetic testing, the right of the person to attain the laboratory records, and a person, from the laboratory to testify at a disciplinary proceeding..

Page **69112** continued,

40.147 What happens when a negative or positive test is also dilute?

UTU generally supports this, but suggests the language currently found in Part 40.25 (2) (ii) be incorporated for clarity.

40.149 What happens if a test is not performed because of a fatal or uncorrectable flaw?

UTU supports this language.

Page **69113**

40.151 What happens when a drug test specimen is unsuitable for testing?

<i>UTU suggests inclusion of language here requiring the laboratory to test the “split” sample..</i>
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40.153 What happens when a drug test is adulterated or substituted?

UTU suggests the language reflect the testing of the “split” prior to making a determination the sample is adulterated or substituted.

40.135 What happens when a drug test specimen is rejected for testing?

UTU supports this language.

40.157 How does the MRO report test results to the employer?

UTU supports this language.

40.135 When MROs send reports of positive, dilute, unsuitable, substituted, or adulterated test results to employers, what is an employer to do?

Alternative 1 for Paragraph (a)

UTU supports this language.

Alternative 2 for Paragraph (a)

*UTU generally supports, but is concerned about the “stand-down” language. If the DOT is insistent on this, they should be so bold to prevent any return to duty **after any test except random tests, until the results are known.** Furthermore, DOT should mandate that all wages be paid the employee for being withheld from service while test are being analyzed, if such test results are negative.*

40.161 May the employer or MRO change a verified drug test result?

UTU supports this language.

40.163 Where is other information concerning the role of MROs found in this regulation?

<i>UTU appreciates the cross-reference guidance this part provides.</i>

Subpart H – Split Specimen Tests and Retests

40.171 How does an employee request a test of a split specimen?

UTU supports this language.

40.173 Who is responsible for paying for the test of a split specimen?

UTU generally supports this section. We would also suggest that language be added requiring the employer to make certain the information requested from the laboratory, and the laboratory person to testify at a disciplinary hearing are clearly communicated in this section. In short the employee should not be held hostage because they cannot afford the cost of the records or witness fee at the time of the hearing.

40.175 What steps does the first laboratory take with a split specimen?

UTU supports this language.

40.177 What does the second laboratory do with the split specimen?

This is where the additional language relating to the split should be incorporated as UTU previously recommends. This should also incorporate that language relating to “test cups”, or other science as DOT/HHS approves of the same.

40.179 Through what methods and to whom must a laboratory transmit split specimen results?

UTU supports this language.

40.181 What information do laboratories need to report to MROs regarding split specimen results?

UTU supports this language.

40.183 What does the MRO do with the split specimen laboratory results?

UTU supports this language.

Page **69116** continued

40.185 Are employees' requests for reanalysis of the specimen from a single specimen collection handled the same way as requests for the test of the split specimen?

UTU supports this language.

40.187 Where is other information concerning split specimens found in this regulation?

<i>UTU appreciates the cross-reference guide this part provides.</i>
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Subpart I – Problems in Drug Tests

40.191 What is a refusal to take a DOT drug test, and what are the consequences?

UTU supports this language.

40.193 What happens when an employee is unable to provide a sufficient amount of urine for a drug test?

<i>UTU suggests adding: (5) If the collection is for a random test, and the Hours of Service expires during the 3 hour period, discontinue the collection, random tests are only allowed while the employee(s) are on duty. No follow-up is needed.</i>

40.195 What happens when an individual is unable to provide a sufficient amount of urine for a pre-employment drug test because of a permanent or long-term disability ?

UTU supports this language.

40.197 What problems will always result in a drug test being cancelled?

UTU supports this language.

40.199 What problems will always result in a drug test being cancelled and may result in a requirement for another collection?

<i>UTU suggests that clear language relating to “dilute ” be placed in here for reference purposes and clarity.</i>

40.201 What problems will result in the drug test being canceled unless they are corrected?

UTU supports this language.

40.203 How are drug test problems corrected?

UTU supports this language.

40.205 What is the effect of a canceled drug test?

UTU supports this language.

20.207 What is the effect of procedural problems that are not **sufficient** to cancel a drug test?

<i>UTU suggests adding after the word employee). “If employee is not accorded laboratory records, and a person to testify, there can be no discipline assessed.”</i>
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Page **69119** continued,

Subpart J-Alcohol Testing Personnel

40.211 Who conducts DOT alcohol tests

UTU suggests the words in part (d) unless..... regulations, be stricken, as that will only confuse supervisors who think they may be qualified to test an employee. The current system works without using this language.

40.213 What requirements must STTs and BATs meet?

UTU supports this language.

Page **69120**

40.215 What requirements must organizations employing SSTs and or BATs meet?

UTU supports this language.

40 217 Where is other information on the role of STTs and BATs found in this regulation?

UTU appreciates this cross-reference guidance.

Subpart K-Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing

40.221 Where does an alcohol test take place?

UTU supports this language.

40.223 What steps must be taken to protect the security of alcohol testing sites?

UTU supports this language.

40.225 What form is used for an alcohol test?

UTU supports this language.

40.227 May employers use the BATF for non-DOT tests and vice-versa?

UTU supports this language.

40.229 What devices are used to conduct alcohol screening tests?

UTU supports this language.

40.231 What devices are used to conduct alcohol confirmation tests?

UTU supports this language.

40.233 What are the requirements for proper use and care of EBTs?

UTU supports this language.

40.235 What are the requirements for proper use and care of ASDs?

UTU supports this language

Subpart G-Alcohol Screening Tests

40.241 What are the first steps in any alcohol screening test?

<i>UTU suggests in (2) (ii), after the word needs, insert the word any.</i>

Page **69122**

40.243 What is the procedure for an alcohol screening test using an **EBT** or non-evidential breath **ASD**?

UTU supports this language.

40.245 What is the procedure for an alcohol screening test using a saliva **ASD**?

UTU supports this language.

40.247 What happens next after the alcohol screening test result?

UTU supports this language.

Page **69123**

Subpart M-Alcohol Confirmation Tests

40.251 What are the first steps in an alcohol confirmation test?

UTU supports this language.

40.253 What are the procedures for conducting an alcohol confirmation test?

UTU supports this language.

Page **69124**

40.255 What happens next after the alcohol confirmation test result?

UTU supports this language.

40.257 When BATs report test results of 0.02 or greater to employers, what is an employer to do?

UTU suggests adding language in (c) An employer shall not discipline an employee on a BAT reported test result of 0.039 or less. However, DOT mandates the employee shall not perform any safety sensitive service until such employees confirmed test result is less than 0.02.

Subpart N – Problems in Alcohol Testing

40.261 What is a refusal to take an alcohol test, and what are its consequences?

UTU supports this language.

40.263 What happens when an employee is unable to provide an adequate amount of saliva for an alcohol screening test?

UTU supports this language.

40.267 What problems always cause an alcohol test to be canceled?

UTU supports this language.

40.269 What problems cause an alcohol test to be canceled unless they are corrected?

UTU supports this language.

40.271 How are alcohol testing problems corrected?

UTU supports this language.

Page **69125** continued,

40.273 What is the effect of a canceled alcohol test?

UTU supports this language.

40.275 What is the effect of procedural problems that are not sufficient to cancel an alcohol test?

UTU supports this language.

Page **69126**

40.277 Are alcohol tests other than saliva or breath permitted under these regulations?

UTU supports this language.

Subpart 0 – Return-to-duty Process and Role of Substance Abuse Professionals (SAPs)

40.281 Who is qualified to act as a SAP?

UTU supports this language.

40.283 When is a SAP evaluation required?

<p><i>UTU suggests adding part (c) A breath alcohol test of 0.039 or less, alone, is not sufficient to mandate an evaluation of an employee by a SAP, or discipline of any kind.</i></p>
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40.285 What information is an employer required to provide concerning SAP services to an employee who has a DOT drug and alcohol regulation violation?

UTU supports this language.

40.289 What is the role of the SAP in the evaluation, referral, and treatment process of an employee who has violated the DOT drug and alcohol regulations?

UTU supports this language.

40.291 Can employees who are referred for SAP evaluations be required to waive liability with regard to negligence or malpractice on the part of the SAP?

UTU supports this language.

40.293 What is the SAP's function in conducting the initial evaluation of an employee?

<i>UTU suggests an attempt be made, if possible to leave the employees' social security number off this report 40.311 (c) (1), (d) (1), and (e) (1). Instead use the employee payroll identification number as one of the delineated items.</i>
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40.295 Can employees or employers seek a second SAP evaluation if they disagree with the first SAP's recommendations?

UTU supports this language.

40.297 Does anyone have the authority to change a SAP's initial assessment recommending assistance?

UTU supports this language.

40.299 What is the SAP's role and what are the limits on a SAP's discretion In referring employees for treatment and education?

UTU supports this language.

Page **69127** continued,

40.301 What is the SAP's function in the follow-up evaluation of an employee?

UTU supports this language.

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40.303 What happens if the SAP believes the employee needs additional treatment, aftercare, or support group services even after the employee returns to safety-sensitive duties?

UTU supports this language.

40.305 Must an employer return an employee to safety-sensitive functions following a SAP determination that the employee demonstrated successful compliance with the SAP's recommendation?

*UTU suggests that this section include some language 'providing an employee has been found to be in violation of **these rules**, and as a result of **the same**, is subject to the rules relating to SAP evaluation, that same employee **shall** be reinstated after a reasonable period if **the** employer is blocking the return to duty. "*

40.307 What is the SAP's function in prescribing the employee's follow-up tests?

UTU supports this language.

40.309 What are the employer's responsibilities with respect to the SAP's directions for follow-up tests?

UTU supports this language.

40.311 Are there any special instructions regarding SAP reports to employers and SAP records?

UTU suggests an alternative to the Social Security number if possible.

40.313 Where is other information on SAP functions found in this regulation?

<i>UTU appreciates the cross-reference guidance this part provides.</i>

Subpart P-Confidentiality and Release of Information

40.321 What is the general confidentiality rule for drug and alcohol test information?

UTU supports this language.

40.323 Can program participants release drug or alcohol test information in connection with legal proceedings?

UTU supports this language.

40.325 May service agents transfer drug or alcohol test information to one another?

UTU supports this language.

40.327 When may the MRO release medical information gathered in the verification process.

UTU supports this language.

40.329 May an MRO provide information about a positive drug test to another employer?

UTU supports this language.

40.331 What information must laboratories and other service agents release to employees?

UTU suggests clarification here that would prevent a laboratory or service agent from holding the records “until employee could pay for them”. Instead, make it a requirement that the employer make certain such records are provided within the time limit of 10 days.

40.333 To what additional parties must employers and service agents release information?

UTU supports this language.

40.335 What records must employers keep?

UTU supports this language.

Subpart Q – Roles and Responsibilities of Service Agents

40.341 Can an employer use a service agent to meet DOT drug and alcohol testing requirements?

UTU supports this language.

40.343 May service agents impose requirements on employers that DOT agency regulations do not authorize?

UTU supports this language.

Page **69131** continued

40.345 If, as a service agent, you fail to comply with DOT regulations, can employers use your services?

UTU supports this language.

40.347 What functions can service agents perform with respect to selection for testing?

UTU supports this language.

40.349 What requirements must a service agent implement concerning the use and confidentiality of information?

UTU supports this language.

40.351 What principles govern the interaction between MROs and other service agents?

UTU supports this language.

Page **69132**

40.353 What other limitations apply to the activities of Service Agents?

UTU supports this language.

Subpart R-Public Interest Exclusions

40.361 What is the purpose of a public interest exclusion?

UTU supports this language.

40.363 In what circumstances does the Department issue a public interest exclusion concerning a service agent?

UTU supports this language.

40.365 Who issues public interest exclusions on behalf of the Department?

UTU supports this language.

40.367 Who initiates the public interest exclusion process?

UTU desires that every complaint be investigated and employees “due process” not be placed at the “alter of the dollar”, as this language indicates. In (a) after the words “initiating official”), strike the word “may” and insert the word “shall”.

Delete paragraph (b) from this part.

40.369 Does the service agent have the opportunity to correct a problem before becoming subject to a public interest exclusion?

UTU supports this language.

40.371 How does the process leading to a public interest exclusion begin?

UTU supports this language.

40.373 How does a service agent contest the issuance of a public interest exclusion?

UTU supports this language.

40.375 How does the Department make decisions in public interest exclusion matters?

UTU supports this language.

40.377 How does the Department notify service agents and employers about decisions on public interest exclusions?

UTU supports this language.

40.379 To whom does a public interest exclusion apply?

UTU supports this language.

40.381 What is the effect of a public interest exclusion?

UTU supports this language.

40.383 How long does a public interest exclusion stay in effect?

UTU supports this language.

40.385 What is the role of the Inspector General's office?

UTU supports this language.

Appendix A to Part 40 -DOT Standards for Urine Collection Kits

UTU supports this language.

Appendix B to Part 40—DOT Drug Testing Semi-annual Laboratory Report

<i>UTU suggests adding section 5. Number of Laboratory errors this quarter.</i>

Appendix C to Part 40—CCF Copies Needed for the MRO Review

<i>UTU suggests adding the time on duty language, time of test initiation, and, if necessary any other information to provide the MRO for discontinuing a random test collection.</i>

Appendix D to Part 40—DOT Drug Testing MRO Reporting Summary

UTU supports this language.

Appendix E to Part 40—Report Format for Split Specimen Failure to Reconfirm

UTU supports this language.

Appendix F to Part 40—SAP Equivalency Requirements for Certification Organizations

UTU supports this language.

